COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department of Telecommunications and Energy on its own Motion into the Appropriate Pricing, based upon Total Element Long-Run Incremental Costs, for Unbundled Network Elements and Combinations of Unbundled Network Elements, and the Appropriate Avoided Cost Discount for Verizon New England, Inc. d/b/a Verizon Massachusetts' Resale Services in the Commonwealth of Massachusetts	D.T.E. 01-20

MOTION OF AT&T COMMUNICATIONS OF NEW ENGLAND, INC. FOR PROTECTIVE TREATMENT OF CONFIDENTIAL INFORMATION

AT&T Communications of New England, Inc. ("AT&T") hereby requests that the Department of Telecommunications and Energy (the "Department") grant protection from public disclosure of certain confidential, competitively sensitive and proprietary information submitted in this proceeding in accordance with G.L. c. 25, § 5D. Specifically, AT&T requests that its supplemental response to VZ-ATT 1-76 be granted protective treatment because it contains competitively sensitive and highly proprietary information and trade secrets.

This response has already been provided to the Department, Verizon and those parties which have signed a protective agreement with AT&T in this docket. If this response is placed in the public record, however, AT&T's competitors would be able to use it to gain an unfair competitive advantage.

I. LEGAL STANDARD.

Confidential information may be protected from public disclosure in accordance with G.L. c. 25, § 5D, which states in part that:

> The [D]epartment may protect from public disclosure trade secrets, confidential, competitively sensitive or other proprietary information

> provided in the course of proceedings conducted pursuant to this chapter. There shall be a presumption that the information for which such protection is sought is public information and the burden shall be on the proponent of such protection to prove the need for such protection. Where the need has been found to exist, the [D]epartment shall protect only so much of the information as is necessary to meet such need.

The Department has recognized that competitively sensitive information is entitled to protective status. *See, e.g., Hearing Officer's Ruling On the Motion of CMRS Providers for Protective Treatment and Requests for Non-Disclosure Agreement*, D.P.U. 95-59B, at 7-8 (1997) (the Department recognized that competitively sensitive and proprietary information should be protected and that such protection is desirable as a matter of public policy in a competitive market). In determining whether certain information qualifies as a "trade secret,"[1] Massachusetts courts have considered the following:

> (1) the extent to which the information is known outside of the business;
>
> (2) the extent to which it is known by employees and others involved in the business;
>
> (3) the extent of measures taken by the employer to guard the secrecy of the information;
>
> (4) the value of the information to the employer and its competitors;

[1] Under Massachusetts law, a trade secret is "anything tangible or electronically kept or stored which constitutes, represents, evidences or records a secret scientific, technical, merchandising, production or management information design, process, procedure, formula, invention or improvement." Mass. General Laws c. 266, § 30(4); *see also* Mass. General Laws c. 4, § 7. The Massachusetts Supreme Judicial Court, quoting from the Restatement of Torts, § 757, has further stated that "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors.... It may be a formula treating or preserving material, a pattern for a machine or other device, or a list of customers." *J.T. Healy and Son, Inc.* v. *James Murphy and Son, Inc*., 260 N.E.2d 723, 729 (1970). Massachusetts courts have frequently indicated that "a trade secret need not be a patentable invention." *Jet Spray Cooler, Inc.* v. *Crampton*, 385 N.E.2d 1349, 1355 (1979).

(5) the amount of effort or money expended by the employer in developing the information; and

(6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Jet Spray Cooler, Inc. v. *Crampton*, 282 N.E.2d 921, 925 (1972).

The protection afforded to trade secrets is widely recognized under both federal and state law. In *Board of Trade of Chicago* v. *Christie Grain & Stock Co.*, 198 U.S. 236, 250 (1905), the U.S. Supreme Court stated that the board has "the right to keep the work which it had done, or paid for doing, to itself." Similarly, courts in other jurisdictions have found that "[a] trade secret which is used in one's business, and which gives one an opportunity to obtain an advantage over competitors who do not know or use it, is private property which could be rendered valueless ... to its owner if disclosure of the information to the public and to one's competitors were compelled." *Mountain States Telephone and Telegraph Company* v. *Department of Public Service Regulation*, 634 P.2d 181, 184 (1981).

II. ARGUMENT.

AT&T's response to VZ-ATT 1-76 contains competitively sensitive and proprietary information and trade secrets. The information contained in this response is not publicly available, is not shared with non-AT&T employees for their personal use and is not considered public information. Any dissemination of this information to non-AT&T employees, such as contract consultants, is done so on a proprietary basis. Even AT&T employees who review this information are subject to non-disclosure agreements and are allowed to use them for internal business reasons only. Furthermore, as discussed in more detail below, this response contains valuable commercial information that competitors could unfairly use to their own advantage. Thus, this response should be granted proprietary treatment and should not be placed on the public record.

A. VZ-ATT 1-76

In response to VZ-ATT 1-76, AT&T reveals when it purchased and installed its most recent Signal Control Point. This information is highly proprietary because it provides AT&T's competitors with a window into AT&T's strategic planning and marketing strategy. This is valuable commercial information that competitors could unfairly use to their own advantage because it provides them with knowledge of whether AT&T has been engaged in extensive recent development of new facilities and whether AT&T will have to make substantial investments in the near future. The Department has recently recognized that a company's levels of investment is proprietary information because "disclosure of this information could assist [the company's] competitors in development of sales and investment strategies." *See* Hearing Officer Ruling on Verizon Massachusetts' Motions for Confidential Treatment, DTE 01-31 (August 29, 2001) ("HO Ruling") at 4 (granting Verizon motion in part).

Furthermore, as noted above, it is also relevant that the information contained in the response to VZ-ATT 1-70 was developed by AT&T at AT&T's expense for its own internal purposes. This information is not publicly available, is not shared with non-AT&T employees for their personal use and is not considered public information. Any dissemination of this information to non-AT&T employees, such as contract consultants, is done so on a proprietary basis. Even AT&T employees who review these materials are subject to non-disclosure agreements and are allowed to use them for internal business reasons only.

Thus, the supplemental response to VZ-ATT 1-76 contains exactly the type of information that G.L. c. 25, § 5D was designed to protect and that the Department has traditionally protected. The Department should grant protective treatment to these responses.

Conclusion.

For these reasons, AT&T requests in accordance with G.L. c. 25, § 5D that the Department grant protective treatment to AT&T's supplemental response to VZ-ATT 1-76.

Respectfully submitted,

_____

Jeffrey F. Jones
Kenneth W. Salinger
Jay E. Gruber
Emily R. Donovan
Kevin R. Prendergast
PALMER & DODGE LLP
One Beacon Street
Boston, MA 02108-3190
(617) 573-0100

Robert Aurigema
AT&T Communications, Inc.
32 Avenue of the Americas, Room 2700
New York, NY 10013
(212) 387-5627

September 26, 2001